Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-3 OF 2000 (W)

WAN ADNAN CJ (MALAYA), MOHAMED DZAIDDIN AND ABDUL MALEK AHMAD FCJJ

23 SEPTEMBER 2000

Companies and Corporations *— Winding up — Notice of demand — Quantification of exact sum due at date of demand, whether necessary — Interpretation of s 218(2)(a) of Companies Act 1965 — Liberal interpretation applied*

The respondent obtained a judgment in default of appearance against the appellant and subsequently served on the appellant a statutory notice of demand pursuant to s 218 of the Companies Act 1965 ('the Act'). The respondent then presented a petition for winding up of the appellant on the ground that the sum demanded in the notice had not been paid by the appellant. The appellant disputed the validity of the s 218 notice. The Court of Appeal held that the failure to quantify the actual sum due in the s 218 notice did not render the demand invalid and, on the facts, the sum demanded in the respondent's notice was not excessive. Leave to appeal was granted to the appellant for the determination of the following questions of law: (i) whether s 218(2)(a) of the Act is to be interpreted literally and strictly or widely and liberally; and (ii) in the event it is the literal and strict interpretation that ought to be adopted, whether the s 218 notice must quantify and specify the exact and actual sum due as at the date of the demand and leave no further sums/amount to be calculated/quantified or ascertained by the recipient of the notice.

Held:

(1) The court should adopt a liberal interpretation when considering the provisions of s 218(2)(a) of the Act. The adoption of a literal interpretation would be difficult as it would compel the court not to make a winding up order notwithstanding the existence of clear evidence that an undisputed sum due exceeding RM500 has remained unpaid after a demand made without any reasonable explanation for the failure to pay. Further, commercial reality demands that liberal interpretation be adopted (see p 667G–H); *Re Fabo Pty* [1988] 14 ACLR 518 followed.

(2) A notice of demand under s 218 need not specify the exact sum due as at the date of demand. So long the sum due exceeded RM500 and remained unpaid after a demand made without any reasonable explanation to the satisfaction of the court, there is therefore neglect to pay such sum within the meaning of the section (see p 668F).

[**Bahasa Malaysia summary**

Responden telah memperolehi suatu penghakiman ingkar kehadiran terhadap perayu dan kemudiannya menyampaikan ke atas perayu satu notis tuntutan berkanun selaras dengan s 218 Akta Syarikat 1965 ('Akta tersebut'). Responden kemudiannya mengemukakan satu petisyen untuk menggulung peraatas alasan bahawa jumlah yang dituntut di dalam notis tersebut masih belum dibayar oleh perayu. Perayu telah mempertikaikan keesahan notis s 218 tersebut. Mahkamah Rayuan memutuskan bahawa kegagalan untuk menghitung jumlah sebenar yang perlu dibayar dalam notis s 218 tersebut tidak menjadikan tuntutan itu tak sah dan, berdasarkan fakta-fakta tersebut, jumlah yang dituntut di dalam notis responden adalah tidak keterlaluan. Kebenaran untuk merayu telah diberikan kepada perayu untuk penentuan persoalan undang-undang yang berikut: sama ada s 218(2)(a) Akta tersebut harus ditafsirkan secara harfiah dan dengan tegasnya atau secara liberal dan dengan longgarnya; dan (ii) sekiranya tafsiran harfiah (literal) dan tegas yang harus diterima-pakai sama ada notis s 218 semestinya menghitung dan menentukan jumlah yang tepat dan sebenarnya kena dibayar setakat tarikh tuntutan tersebut dan tidak meninggalkan sebarang jumlah yang selanjutnya untuk dihitung/dikira atau ditentukan oleh penerima notis tersebut.

Diputuskan:

(1) Mahkamah haruslah menerima-pakai tafsiran yang longgar ketika mempertimbangkan peruntukan-peruntukan s 218(2)(a) Akta tersebut. Penerimapakaian pentafsiran liberal akan menjadi sukar kerana ianya akan memaksa mahkamah untuk tidak membuat perintah penggulungan meskipun wujudnya keterangan jelas bahawa satu jumlah yang tidak dipertikaikan melebihi RM500 telah kekal tidak dibayar selepas satu tuntutan dibuat tanpa sebarang penjelasan yang berpatutan bagi kegagalan untuk membayar. Selanjutnya, hakikat komersyial menuntut bahawa pentafsiran liberal diterima-pakai (lihat ms 667G–H); *Re Fabo Pty* [1988] 14 ACLR 518 diikuti.

(2) Suatu notis tuntutan di bawah s 218 tidak perlu menentukan jumlah tepat yang kena dibayar seperti mana pada tarikh tuntutan. Asalkan jumlah yang kena dibayar melebihi RM500 dan kekal tidak berbayar selepas satu tuntutan dibuat tanpa sebarang penjelasan yang berpatutan demi kepuasan mahkamah, oleh itu terdapatnya kecuaian untuk membayar jumlah sedemikian di dalam lingkungan seksyen tersebut (lihat ms 668F).]

Notes

For cases on notice of demand, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 968–970.

Cases referred to

Ataxtin Pty Ltd v Gordon Pacific Developments Pty Ltd [1991] 9 ACLC 865 (refd)
Chin Choy & Ors v Collector of Stamp Duties [1979] 1 MLJ 69 (refd)
Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation 81 ATC 4292 (refd)
Deputy Federal Commissioner of Taxation v Cye International Pty Ltd (No 2) [1985] 4 ACLC 281 (refd)
Fabo Pty Ltd, Re [1988] 14 ACLR 518 (folld)
Inter-Builders Development Pte Ltd, Re [1991] 3 MLJ 259 (refd)
Re Makin Nominees Pte Ltd [1994] 3 SLR 429 (refd)
Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd [2000] 1 MLJ 98 (refd)
Pardoo Nominees Pty Ltd, Re [1987] 11 ACLR 573 (refd)
Processed Sand Pty Ltd v Thiess Contractors Pty Ltd [1982–83] 7 ACLR 956 (refd)
Perusahaan Jenwatt Sdn Bhd, Re [1990] 2 MLJ 178 (refd)
Sri Hartamas Development Sdn Bhd v MBf Finance Bhd [1992] 1 MLJ 313 (refd)
United Malayan Banking Corp Bhd v Richland Trade & Development Sdn Bhd [2000] 1 MLJ 385 (refd)

Legislation referred to

Companies Act 1965 ss 218, (2)(a)
Companies Act (Cap 50, 1990 Ed) s 254(2)(a) [Sing]
Companies Code (NSW) s 364(2)(a) [Aust]
Companies Code (Tasmania) s 364(2) [Aust]
Corporations Law (Victoria) s 460(2)(a) [Aust]

Appeal from: Civil Appeal No W–02–308 of 1996 (Court of Appeal, Kuala Lumpur)

Saranjit Singh (*Vasdev Bakshani* with him) (*KS Narayanan Associates*) for the appellant.
Moh Kak Wai (*Aznim bte Azhar* with him) (*Tengku Mohamed & Alan Lim*) for the respondent.

Mohamed Dzaiddin FCJ (delivering judgment of the court): This appeal is concerned with the interpretation of s 218(2)(a) of the Companies Act 1965 ('the Act') which reads as follows:

> (2) A company shall be deemed to be unable to pay its debts if —
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding RM500 then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; ... .

Leave to appeal was granted by this court to the appellant on 20 March 2000 for the determination of the following questions of law:

(a) Whether s 218(2)(a) of the Act is to be interpreted literally and strictly or widely and liberally.

(b) In the event, it is the literal and strict interpretation that ought to be adopted whether the s 218 notice must quantify and specify the exact and actual sum due as at the date of the demand and leave no further sums/amounts to be calculated/quantified or ascertained by the recipient of the notice.

Background

The brief facts of the case are these. On 18 October 1989, the respondent obtained a judgment in default of appearance against the appellant in the Kuala Lumpur High Court for a sum of RM334,118.79 together with interest thereon at the rate of 8% pa from 28 October 1988 until date of payment. The appellant made no effort to have the said default judgment set aside. Then on 16 October 1991, the respondent's solicitors served on the appellant a statutory notice of demand pursuant to s 218 of the Act which reads as follows:

> To:
>
> Malaysia Air Charter Co Sdn Bhd
> Suite 16–02,16th Floor
> Wisma SPK
> Jalan Sultan Ismail
> 50250 Kuala Lumpur
>
> Take notice that you are now required to pay to us as solicitors for Petronas Dagangan Sdn Bhd or secure or compound to the satisfaction of Petronas Dagangan Sdn Bhd the *judgment sum of RM334,118.79 together with interest thereon at the rate of 8% pa on all outstanding sums from 28 October 1988 until the date of realization* and the sum of RM225 costs being judgment obtained against you at the Kuala Lumpur High Court Kod No D2–23–2714–88 within three weeks from the date of receipt of this notice, failing which you shall be deemed to be unable to pay your debts and appropriate action will be taken for the winding-up of Malaysia Air Charter Co Sdn Bhd. (Emphasis added.)
>
> Dated: 16 October 1991
>
> Sgd
> Solicitors for Petronas Dagangan Sdn Bhd

On 27 February 1992, the respondent presented a petition for winding-up of the appellant on the ground that the sum demanded in the notice had not been paid by the appellant. It was at this stage that the appellant disputed the validity of the s 218 notice. On 6 May 1996, the High Court ordered that the appellant be wound up. However, by consent, the winding-up order was stayed pending an appeal to the Court of Appeal.

In the Court of Appeal, the argument on behalf of the appellant on the validity of the respondent's s 218 notice was two-fold. First, it was submitted that the demand under s 218(2)(a) required '*the sum so due*' to be

A clearly specified and quantified and that no sum whatsoever ought to be left to be calculated or ascertained by the recipient of the notice. Failure to do so would result in the statutory notice being invalid. Secondly, the sum demanded by the respondent, namely, 'the *judgment sum of RM334,118.79 together with interest thereon at the rate of 8% pa on all outstanding sums from 28 October 1988 until the date of realization*' was in excess of what was actually B due, and therefore the notice was invalid and did not raise the presumption under the said section.

The Court of Appeal, in dismissing the appeal, held that the failure to quantify the actual sum due in the s 218 notice did not render the demand invalid, and on the facts, the sum demanded in the respondent's notice was C not excessive (see *Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd* [2000] 1 MLJ 98).

The court relied on the Supreme Court decision in *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1992] 1 MLJ 313 where the statutory notice of demand under s 218 is similar to the present case. It also D followed its own decision in *United Malayan Banking Corp Bhd v Richland Trade & Development Sdn Bhd* (unreported) which was affirmed by the Federal Court (see [2000] 1 MLJ 385).

Following *Sri Hartamas*'s case, the Court of Appeal, per Shaik Daud JCA stated (at p 102):

> E The Supreme Court while endorsing that s 218(2)(a) ought to be strictly interpreted went on to say that a demand does not fall within s 218(2)(a) if the amount demanded exceeds the sum actually due, and held that in that case the statutory demand was not bad or invalid, as it was made in writing and was signed and delivered at the registered address of the appellant and it had specified the actual amount due. We believe what the Supreme Court was saying is that the amount due is the judgment sum including interest. F Although the statutory notice in *Sri Hartamas* did not quantify the interest due, nevertheless the Supreme Court held that it was a good and valid notice. In the final analysis the purpose of the statutory notice is to demand the judgment sum inclusive of the interest, quantified or otherwise, and if not paid within the stipulated period of three weeks, is to warn the debtor of an impending petition. Had the notice mentioned a sum in excess of the G judgment sum then such notice would not have strictly complied with s 218(2)(a) and thus would be bad and invalid. We are bound by the decision in *Sri Hartamas*. Since the notice in the present appeal is similar with that in *Sri Hartamas*, we hold that the notice, although it did not quantify the interest due, was made in writing and was signed and delivered by the respondent's authorized agent at the appellant's registered address and it has specified the H actual sum due which was not disputed, was a good and valid notice. Section 218(2)(a) only provides that a demand under the hand of the creditor or under the hand of his agent lawfully authorized, must be served on the company by leaving the said document at its registered address requiring the company to pay the sum due. It is our view that it makes no difference whether the interest is quantified or not.

I His Lordship concluded (at p 103):

> In the present appeal, we hold that the requirements of the section relating to demand has been similarly complied with. Therefore we see no merits in the

argument that since the interest is not quantified the notice is bad and invalid. We would like to reiterate that even by the non-quantification of the interest in the notice, the respondents had strictly complied with the requirements of s 218(2)(a). We, therefore, dismiss the appeal with costs and order the deposit to go to the account of taxed costs.

Appeal to this court

Before us, the thrust of En Saranjit's submission is that s 218(2)(a) of the Act should be construed literally and the statutory notice of demand requiring the company to pay the sum due must contain a specific, ascertained and quantified sum as at the date of the notice.

Counsel submitted that the Court of Appeal was correct in its decision that s 218 of the Act must be construed strictly. The court followed *Re Perusahaan Jenwatt Sdn Bhd* [1990] 2 MLJ 178 which was approved and followed by the Supreme Court in *Sri Hartamas*'s case.

In *Re Perusahaan Jenwatt* the Government of Malaysia obtained a judgment in default of appearance against a company for the sum of RM25,987.50 with interest thereon calculated at the rate of 8% pa from the date of judgment to the date of realization and costs of RM225. The government then sent a notice of demand to the company for payment of the sum of RM295,584.46 pursuant to s 218(2)(a) of the Act. Subsequently, the government presented to the court a petition for the winding up of the company on the ground that the company was unable to pay its debts. In the petition, the government stated that the company was indebted to the government in the sum of RM29,584.46 and that the company had not complied with the notice of demand. The company applied to the court for an order setting aside the petition on the ground that the notice was invalid as the company did not owe the government the amount stated in the notice.

In allowing the company's application, Zakaria Yatim J (as he then was) held that s 218(2)(a) of the Act should be given a literal interpretation and the notice of demand must comply strictly with the requirements of s 218(2)(a). On the facts, his Lordship found the notice of demand had not complied strictly with the requirements of s 218(2)(a) because the amount stated in the said notice was far in excess of the debt due and therefore the notice was invalid.

In *Sri Hartamas*'s case, the primary issue was whether the petition for winding-up was presented three weeks after the statutory notice under s 218(2)(a) of the act. The High Court held the notice was properly issued and was in strict compliance with the section.

On appeal, the Supreme Court in affirming the decision of the High Court that the demand must comply strictly with the requirements of s 218(2)(a) held that the three weeks in the subsection referred to the neglect to pay before the presumption of inability to pay the debt arose and was not a requirement relating to the notice of demand. The court also agreed with *Re Perusahaan Jenwatt* that a demand did not fall within

s 218(2)(a) of the act if the amount demanded exceeded the sum actually due.

On question (b), counsel submitted that on a strict interpretation of s 218, a notice of demand under sub-s (2)(a) of the section must quantify or specify the actual sum so due as at the date of the notice. As an exercise in statutory interpretation, words and phrases in a statute must be given their ordinary meaning (*Chin Choy & Ors v Collector of Stamp Duties* [1979] 1 MLJ 69). Therefore, the word 'sum' in the sub-s (2)(a) must bear a plain dictionary meaning, ie 'a quantity or amount of money'; 'a sum of money'; 'quantity of money of a specified amount'. (see *The Shorter Oxford English Dictionary*). Hence, what the subsection envisaged was a specific or ascertained sum as at the date of the notice. Secondly, taking the literal construction approach, creditors who resort to s 218 procedure is not entitled to truncate the right conferred under sub-s (2)(a) which requires strict compliance. Counsel concluded that a s 218(2)(a) notice which merely demands the terms of the judgment without specifying the actual sum so due as at the date of the notice is therefore invalid and cannot form the basis of the winding-up petition under s 218(1)(a) of the Act.

Counsel referred to several authorities which we shall now examine.

In *Re Perusahaan Jenwatt*, the amount stated in the s 218(2)(a) notice was found to be in excess of the debt due. The High Court taking the strict interpretation approach held the notice to be invalid as the sum demanded exceeded the sum actually due. The learned judge followed *Processed Sand Pty Ltd v Thiess Contractors Pty Ltd* [1982–83] 7 ACLR 956.

In *Processed Sand*'s case, there was no dispute as to the fact of the indebtedness of each plaintiff to the defendant, but only as to the amount due. The question in issue was as to the validity of a notice of demand which required payment of a sum which was greater than the amount actually due. On the true construction of s 364(2)(a) (in pari materia with our s 218(2)(a)) of the New South Wales Companies Code, Waddell J adopted the literal interpretation and held that a notice of demand which claimed more than the amount actually due did not come within the section and non-compliance with it did not give rise to any deemed inability on the part of the company to pay its debt. He reasoned as follows (at p 961):

> Its effect is to provide a statutory admission that a company is unable to pay its debts. One would expect such an admission to be created only if the amount claimed by the notice of demand and not paid or secured or compounded for to the reasonable satisfaction of the creditor was an amount either admittedly due or one as to which there was no real dispute as to liability. It would seem arbitrary and unjust to create an admission arising on failure to pay etc a debt, a part of which was not due.

The above decision was followed in *Deputy Federal Commissioner of Taxation v Cye International Pty Ltd (No 2)* [1985] 4 ACLC 281.

In *Re Pardoo Nominees Pty Ltd* [1987] 11 ACLR 573, the Supreme Court of Tasmania case, the plaintiff served a demand on the defendant company for A$176,431.40 pursuant to s 364(2) of the Companies (Tas) Code. The defendant failed to comply with the demand. The actual amount

owing at the date of the demand was only A$172,434.81. The question before the court was whether the plaintiff had established the requirements for deemed insolvency under s 364(2). The use of the word 'deemed' in s 364(2) does not constitute a statutory fiction but rather lists methods of proof and accordingly, one may interpret the section in a practical frame of mind. Secondly, in making an order for winding-up of the company, Cosgrove J held that the primary fact of a debt in excess of A$1,000 and failure to pay had been established, the fact that a demand claims a sum, part of which was disputed or irrecoverable, was irrelevant. His Lordship refused to follow Waddell J's reasoning in *Processed Sand*'s case because 'the decision is based quite specifically on a literal interpretation of para (a) of sub-s (2) of s 364.'

In *Re Fabo Pty Ltd* [1988] 14 ACLR 518, the statutory demand was for A$131,469.82 comprising a judgment debt and interest and two other sums due and costs of A$19.60 which was not due. The company did not dispute the indebtedness in the amounts claimed. At the hearing before the Master, no order was made regarding costs. The notice therefore overstated the sum due under s 364(2)(a) Companies (Victoria) Code. The Master referred to a judge, who in turn referred to the full court, the question whether in these circumstances a winding-up order should be made.

The full court, ordering that the company should be wound up, held, inter alia, that overstatement in the notice of demand of the amount due did not destroy the validity of the notice. The fact of non-compliance with the demand may still be relied upon to prove insolvency. Crocket ACJ, O'Bryan and Vincent JJ approved *Re Pardoo*. The learned judges were fully appraised of the conflicting approaches taken by Cosgrove J in *Re Pardoo* and Waddell J in *Processed Sand*'s case. In preferring the liberal interpretation to s 364(2)(a), their Lordships were of the view that there are a number of considerations that render the adoption of a literal interpretation difficult, which inter alia, include the following (at pp 521–522):

> (a) A literal interpretation would compel the court not to make a winding-up order notwithstanding the existence of clear evidence that an undisputed due debt exceeding A$1000 has remained unpaid after the making of a proven demand without any reasonable explanation being advanced for this failure to do so. ...
>
> By contrast, the wider interpretation avoids such unfortunate consequences, is consistent with the legislative scheme underlying the provisions and permits the court to make a winding-up order where it is appropriate to do so.
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> (b) The fact that the company will not be wound up even if it fails to heed a valid notice if it establishes by independent evidence that it solvent.
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> (c) The fact that the company may still not be wound up despite non-compliance with the notice of demand as the introductory words to sub s (1) vest a discretion in the court as to whether it will make such an order even though it may be satisfied that the company is unable to pay its debts. In this context two comments should be made. First the discretion and the need to exercise it in each case cannot be negated by any suggestion that non-compliance with a demand for payment gives the

A applicant a right to an order ex debito justitiae. Second, the possibility of an oppressive use of the procedures for winding up does not appear to us to be substantially related to the accuracy of an initiating notice of demand where an undisputed liability exists in respect of an appropriate amount, but may arise out of a variety of other circumstances with which it is not necessary to be concerned in the present matter. Whatever may B be the origin of any such oppression, the court would have the power and indeed the responsibility to prevent as far as possible the employment of the procedures in a fashion which could be seen to produce the perpetration of an injustice to the company concerned. Doubtless this is the reason for the existence of a statutorily conferred discretion.

(d) Commercial reality demands that preference be given to an interpretation C that will remove from unmeritorious respondents the temptation to undertake an investigation into the exactness of the debt claimed to be owing on the relevant date in cases where complicated accounts or running accounts with daily adjustments may render probable the risk of some small errors having been made in the course of ascertaining with precision the extent of the debt. Indeed, the possibility exists that a D contrary interpretation might lead to the absurdity that an understatement of the debt in the notice would prevent the making of an order where to do so was clearly appropriate.

(e) The juxtaposition of s 364(2)(c) and the concluding words of the subsection 'the company shall be deemed to be unable to pay its debts' is used to prescribe avenues of proof as opposed to creating a statutory fiction (see *Re Pardoo Nominees Ptd Ltd*). E

In this context care must be taken to distinguish between cases where a genuine dispute as to the fact of indebtedness in respect of an amount satisfying the statutory requirement may exist and those in which, whatever may be the situation in respect of some part of the sum claimed, there is clearly an outstanding debt to such an amount. With respect we do not share the view F expressed by Wadell J that in the latter situation it would be arbitrary or unjust to give effect to the 'deeming' provision of s 364(2).

Their Lordships concluded (at p 523):

In consequence the construction that we prefer is that the subsection does not operate so as to create a 'statutory fiction'. The opinion that it does have such G an effect appears to us to afford by implication, if not expressly, the foundation for the conclusion that an overstatement of amount of the debt destroys the validity of the notice in the cases in which it was so held. With respect, for the reasons given, we consider the contrary view to be the better view. What the subsection does is to provide certain avenues of proof of insolvency by allowing the conclusion of insolvency to be drawn wherever the circumstances are appropriate. H

In our opinion, having been called upon to pay an amount including a sum undoubtedly due, the company could be reasonably called upon to pay that sum and to demonstrate the existence of genuine dispute as to its liability in respect of the balance.

In *Ataxtin Pty Ltd v Gordon Pacific Developments Pty Ltd* [1991] 9 ACLC I 865, the applicant had obtained a judgment for the sum of A$475,000 plus interest from the Supreme Court of Victoria against the respondent. The respondent appealed to the full court in Victoria, which refused to stay the

execution of the judgment. The applicant issued a warrant to execute the judgment. Subsequently it received A$286.78 from the Sheriff's Office of Victoria in relation to that warrant.

The applicant then issued a demand under s 460(2)(a) of the Corporations Law for the judgment debt plus interest accrued. Due to a miscalculation the demanded sum of A$552,484.22 was in excess of the amount then owing by A$4.53. The respondent did not comply with the demand and a winding up application was made by the applicant in the Federal Court.

One of the questions raised before Heerey J was whether the s 460(2)(a) demand which overstated the actual sum due was valid. His Lordship held that on its true construction the demand was invalid. A demand, non-compliance with which triggers the statutory deeming of inability to pay debts, has to be one which requires the company to pay the actual sum which is due. He made the decision on the basis that this was an exercise in statutory construction. Citing the words of Gibbs CJ in *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* 81 ATC 4292 that it is an elementary and fundamental principle that the object of the court, in interpreting a statute, 'is to see what is the intention expressed by the words used', his Lordship held as follows (at p 870):

> Approaching s 460(2)(a) afresh, it seems to me that its ordinary and natural meaning is that the company has to be 'indebted in a sum exceeding A$1,000 then due' and that the demand, non-compliance with which triggers the statutory deeming of inability to pay debts, has to be one which requires the company 'to pay the sum so due', that is to say, the actual sum which is due.

His Lordship appeared to be fully aware of conflicting decisions in Australia where the courts in Victoria, South Australia, Tasmania, Western Australia and the Northern Territory have held such a demand to be valid, but the New South Wales and Queensland courts held otherwise. His Lordship did not follow *Re Fabo*, a decision of the full court of Victoria which took a liberal approach and held a demand was valid if it claimed an amount in excess of the sum due.

His Lordship observed that the courts which adopted the liberal approach to the section did not attempt any construction of the actual language of the statute which fitted that view. He also disagreed with the proposition that one should avoid a technical construction of the law which would produce the absurd result that a company undoubtedly insolvent and admittedly owing a large amount to a creditor would escape winding up because of some tiny miscalculation, something which would be quite likely to happen where there are complex running accounts, interest calculations and the like.

In Singapore, in so far as we are aware, there are two cases on the point in issue. The relevant section is s 254(2)(a) of the Singapore Companies Act (Cap 50, 1990 Ed). In *Re Inter-Builders Development Pte Ltd* [1991] 3 MLJ 259, the company opposed the petition for winding-up on the ground that the amount due as stated in the statutory demand was in error which would render the demand defective.

Rajendran J followed *Re Pardoo* and *Re Fabo* and disagreed with *Re Perusahaan Jenwatt*. Adopting the liberal interpretation, his Lordship held (p 262):

> In my view, s 254(2)(a) would operate if the petitioning creditor can establish that a sum exceeding S$2,000 is due to him from the company and he has made a demand for a sum in excess of S$2,000 in the manner provided in s 254(2)(a) which the debtor has neglected to pay.

The above decision was followed later in *Re Makin Nominees Pte Ltd* [1994] 3 SLR 429. This is what Lim Teong Qwee JC stated (at pp 442–443):

> I respectfully agree with Rajendran J in preferring to follow *Re Pardoo Nominees Pty Ltd* and *Re Fabo Pty Ltd*. I think a statutory demand requiring payment of an amount that includes a sum exceeding S$2,000 that is admittedly due is not invalid for the purpose of s 254(2)(a) of the Companies Act by reason only that the amount also includes a sum not due. It is as well a demand requiring the company to pay the sum due notwithstanding that it is also a demand as to a sum not due. I see no difference in principle between the sum not due and a claim which is met by a set off or counterclaim or cross-claim made bona fide and based on substantial grounds. If the company omits to pay the sum admittedly due and to dispute its liability as to the excess without any explanation for the omission it is open to the court to find that the company has neglected to pay the sum due and that it is unable to pay its debts. This is particularly so where the sum admittedly due can be readily seen on the face of the demand or the accompanying statements as in this case and the company fails to respond altogether.

From the Australian authorities which we have examined, it is clear to us that there exists a conflict of decisions with respect to the interpretation of the provisions of their equivalent to our s 218(2)(a) of the Act on the question whether the statutory demand is valid if it claims an amount in excess of that due by the company. Waddel J in *Processed Sand*'s case, supported by Heerey J in *Ataxtin* adopted the literal interpretation and held that an excess claim makes the demand invalid. On the other hand, *Re Pardoo*, which was approved at the appellate level by the full court of Victoria in *Re Fabo* took the liberal approach, whose reasoning was followed by at least two Singapore High Court decisions.

After analysing the authorities, we would prefer the reasoning and conclusion of the full court of Victoria in *Re Fabo* that the court should adopt a liberal interpretation when considering the provisions of s 218(2)(a) of the Act. We have earlier set out the reasons of the full court for adopting a liberal interpretation and their considerations that the adoption of a literal interpretation would be difficult. We would reiterate here that we agree with *Re Fabo* that a literal interpretation of the section would compel the court *not* to make a winding-up order notwithstanding the existence of clear evidence that an undisputed sum due exceeding RM500 has remained unpaid after a demand made without any reasonable explanation for the failure to pay. In the instant case, the statutory demand required the appellant to pay the respondent the judgment sum of RM334,118.79 together with interest at 8% pa etc as at the date of the notice. From the evidence, the aforesaid sum remained unpaid. Thus, if we were to interpret

the section literally or strictly, it means no winding-up order could be made as the exact amount due as at the date of the notice has not been quantified, notwithstanding that the debt exceeded RM500 and remained unpaid. By contrast, the liberal interpretation would permit the court, if proved to its satisfaction, to make a winding-up order.

Secondly, we agree with *Re Fabo* that commercial reality demands that 'preference be given to an interpretation that will remove from unmeritorious respondents the temptation to undertake an investigation into the exactness of the debt claimed to be owing on the relevant date in cases where complicated accounts or running accounts with daily adjustments may render probable the risk of some small errors having been made in the course of ascertaining with precision the extent of the debt. Indeed, the possibility exists that a contrary interpretation might lead to the absurdity that an understatement of the debt in the notice would prevent the making of an order where to do so was clearly appropriate'. It is necessary to consider the factual situation presented in this appeal for the unreality of the literal approach to become evident. Here, the appellant was required to pay the respondent the judgment sum of RM334,118.79 together with interest thereon at the rate of 8% pa on all outstanding sums from 28 October 1988 until the date of realization. By taking the literal interpretation approach, the respondent is required to undertake an exercise in calculating the exact sum due as at the date of the notice when on the face of the notice the sum due is more than RM500 and the appellant has been shown as deemed to be unable to pay its debts.

Conclusion

For the above reasons, our answer to the two questions posed in the appeal is that s 218(2)(a) of the Act should be liberal interpreted. A notice of demand under the subsection need not specify the exact sum due as at the date of the demand. So long the sum due exceeds RM500 and remained unpaid after a demand made without any reasonable explanation to the satisfaction of the court, there is therefore neglect to pay such sum within the meaning of the section. It should however be borne in mind that s å218(2)(a) does not create separate grounds for winding-up, but provides a mode of proof available in aid of an application seeking a winding-up on the ground specified in s 218(1), viz that the company is unable to pay its debts (*Ataxtin*). A company will not be wound up, even if it fails to heed a valid notice, if it can establish by independent evidence that it is solvent (*Re Fabo*).

In adopting the *Re Fabo* approach to the interpretation of s 218(2)(a) of the Act, we have therefore differed from the High Court decision of *Re Perusahaan Jenwatt* which followed *Processed Sand*'s case. The Supreme Court in *Sri Hartamas*'s case likewise adopted a literal interpretation in dealing with the question whether under s 218(2)(a), a company was entitled to have three weeks after service of the notice of demand to either pay, secure or compound the sum demanded. The court also took the opportunity to agree with *Re Perusahaan Jenwatt* that a demand did not fall

within s 218(2)(a) if the amount demanded exceeded the sum actually due. With respect, we consider this passage in the judgment of Gunn Chit Tuan SCJ obiter because the claim of the excess sum in the notice was never an issue before the court. In fact, the amount stated in the notice was not in dispute.

Lastly, returning to the instant case under appeal, it is worth noting that the Court of Appeal found that the facts therein are on all fours with the facts in *Sri Hartamas*'s case. The Court of Appeal followed *Sri Hartamas*'s case, on the basis of stare decisis, which in effect held that although the statutory notice did not quantify the interest due, it was still a good and valid notice. The Court of Appeal did not make any specific finding whether s 218(2)(a) is to be interpreted literally as in *Re Perusahaan Jenwatt* or liberally, although its conclusion appears to be based on a liberal interpretation of the subsection.

In the circumstances, we agree with the conclusion of the Court of Appeal but for different reasons. Accordingly, we dismiss this appeal with costs and order the appellant be wound up. Deposit to the respondent to account of taxed costs.

Order accordingly.

Reported by Jafisah Jaafar